THE LOCUS OF SALES C. O. D.

The "Sales of Goods Act" of 1894, drafted by Mr. Chalmers, has ably codified the law of England upon the subject of sales of personalty, and a like attempt is being made for this country. Mr. Samuel Williston, at the instance of the Conference of Commissioners for Uniform State Legislation, has prepared a draft of an act for codifying our own law of sales, which is to be proposed for general enactment in our States. Mr. Williston's draft is mainly a transcript of the English act, but with some judicious emendations and some slight errors. Neither the English law, it is believed, nor the proposed American act, definitely settles one point in the law of sales which has of late been litigated with growing ferquency, and concerning which the cases exhibit irreconcilable differences. That is the *locus* of a sale where goods are shipped C. O. D. by the vendor to the vendee via a common carrier, as per the vendee's order. The English act (sec. 18) and the American draft (sec. 19) are alike in this provision: "Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed." The American draft contains (sec. 21) a new proviso, that where delivery has been made to the buyer, "or to a bailee for the buyer, and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery." The last of these provisions may possibly remove one cause of contention as to shipments C. O. D., but not the main cause, which has generally been the legality of the sale as within one or the other jurisdiction, and controlled by the one or the other law, namely, that of the place of the shipment or of the place of final receipt of the goods. Neither of these provisions seems to otherwise clearly attach any new or altered meaning or effect to the letters C. O. D.

This form of shipment (C. O. D.), it is believed, is mainly adopted in consignments by express companies. What portion of the business of those great corporations such shipments constitute is not easy to determine. Letters of inquiry were addressed to the general offices of the Adams Express Company, the United States Express Company, and the American Express Company. A courteous reply was received from the first company, saying that it kept no statistics which would furnish this information; from the second, saying, "The information you ask for is such that we make it a point not to give it out." No such necessity for reticence seems to be felt by the third, the American Express Company, as the inquiry was referred to Mr. Antisdel, of Chicago, general manager of its Western Department, and he, under date of February 10, 1904, very obligingly replies. "I have been obtaining information to enable me to answer your communication. From figures compiled I find that, as near as can be ascertained, five per cent. of the shipments, handled by this company, are sent C. O. D.", and he most kindly offers any other information that will be of assistance.

As far as we can judge, then, one-twentieth of the shipments by express are sent C. O. D., and this means, of course, a very considerable amount in bulk and value. No exact and recent figures have fallen under the eye of the writer, and no minute investigation is requisite. The volumes of miscellaneous statistics from the census of 1900 are not as yet, it is believed, fully published, but in those from the census of 1890 it appears that the express companies of the United States were, in 1890, forwarding over one hundred and fifteen millions of packages per annum, at an expense to themselves of nearly forty-six millions of dollars. The report of the Interstate Commerce Commission for 1902 shows that in the preceding year these companies paid to the railways over thirty-one millions of dollars, an increase of about sixty per cent. over the payments to railways in 1890. It is perhaps fair, therefore, to estimate the increase of their business at a like percentage. That would make the number of packages carried in recent years about one hundred and eighty-four millions per annum. The companies were expending nearly forty-six

millions in 1890, and a like estimate would show their annual disbursements at the present to be about seventy-three millions of dollars.

Five per cent. upon transactions of such magnitude is worth attention, since it means over nine millions of packages every twelve months, carried at a cost to the companies of over three and a half million dollars. The C. O. D. transactions would involve all charges of carriage, naturally in excess over this cost to the companies, and, in addition, the entire value of the packages, over nine million in number, per year.

MEANING OF "C. O. D."

The meaning of these letters has been fully ascertained by the courts on testimony given, and without testimony. Thus, in Baker *v.* Bourcicault,[1] (decided by the Court of Common Pleas of N. Y. in 1860), defendant ordered, by post, of the plaintiff, certain cards, to be sent by express to New Orleans, and added that he would either pay by return post, or "the express may collect the same for you at your option." The cards were sent by the Adams Express Co., addressed to Dion Bourcicault, Gayety Theatre, New Orleans, C. O. D. They were forwarded by the steamship Crescent City, which was lost at sea, and were never received. The agent of the express company testified that when the goods were received, marked in this way, the company did not deliver them unless the bill was paid, and that the initials "*C. O. D.*" meant "*collect on delivery.*" The court interpreted them accordingly, and held that, when goods were sent in this way, payment and delivery are simultaneous acts, and, though the property be delivered, no title passes, unless it is apparent from the circumstances under which the delivery was made that the vendor meant to trust to the ability and readiness of the vendee to perform his agreement, and did not intend to insist upon strict payment as a condition precedent to the passing of the title. Unless immediate payment is thus waived, the vendor may, by an action for the wrongful detention, reclaim the property, as his title in it is not divested until payment. The court therefore held that the title to the cards had not

[1] 1 Daly 23.

passed to the defendant, and reversed a judgment for their value given for the plaintiff. It will be observed that this is perhaps the earliest case, and is decided by a court not of last resort.

The meaning attached to the letters C. O. D. has been uniformly found as above, "*collect on delivery.*" In some cases the interpretation has been on testimony given to inform the court.[1] But without testimony, courts and juries may, from their general information, "take the initials C. O. D., when affixed to packages sent by common carrier for the carriage of the goods," to so mean, as was held in State *v.* Intoxicating Liquors.[2]

Starting with the meaning as thus ascertained, dispute has not infrequently arisen, as in the case in the 1 Daly, as to where title passed or when the sale was consummated, whether at the point of shipment or of final arrival and delivery. This has been vital in determining especially,

First, the validity of the sale and appurtenant contracts as judged by the law of one jurisdiction or another;

Second, the criminality of the vendor in case of sales prohibited in one place, and not the other;

Third, the place of prosecution, even where such sales are criminal under the laws of both places;

Fourth, upon whom the loss falls in case of injury or destruction of the goods in transit.

THE ENGLISH DECISIONS.

If we may rely on the American and English Encyclopedia of Law,[3] there are no English decisions upon this subject, and none have been found in Mew's English Case Law Digest. (Under appropriate titles as "Sale of Goods," sub-title "When Property Passes," subdivision "Delivery to Carriers.")[4] (See also Law Reports Digest, 1891–1900, title, "Sale of Goods.") Nor are such English cases apparently known to the American courts, which have so fully discussed the question. Though English cases have been cited which indirectly and remotely bear upon the

[1] State *v.* O'Neill (1885) 58 Vt. 140. Crook *v.* Cowan (1870) 64 N. C. see p. 745.

[2] (1882) 73 Me. 278. [3] 2d Ed. 1903, Vol. 24, p. 1072.

[4] Vol. 12, p. 459, 1877.

point, it is believed that they merely deal with points of law undisputed and as well settled on this side of the Atlantic as on the other.

THE DECISIONS IN THE UNITED STATES.

The principal decisions, in order of time, are as follows, remembering the case already considered in the 1 Daly, decided in 1860. The next succeeding case, Crook *v.* Cowan,[1] was decided in 1870. An order was sent by post from Wilmington to Baltimore for two carpets of a certain description, to be sent "per express C. O. D." It was held that the shipment of the goods accordingly was a due acceptance of the offer, and that on such delivery to the carrier, "the property in the carpets passed to the defendant." An offer requesting a shipment by express is here compared, and very justly, to an offer requiring a reply by post, and the well-known rule that in such case the due posting of the acceptance at that time and place completes the contract is extended to such shipment by express, the famous old English case of Adams *v.* Lindsell,[2] as to such acceptance by post, being relied on. The doctrine of that case has been unanimously adopted in this country as well as in England, even Massachusetts having at last, under the unlightened lead of Mr. Justice Holmes, abandoned her archaic doctrines to the contrary. See Brauer *v.* Shaw.[3]

Almost every commercial letter has upon it a stamp requiring its return if not delivered within a limited number of days. This has at least points of resemblance to the shipments C. O. D., in that the delivery to the post is, in a way, conditional, yet it is submitted that such a stamp upon a letter of acceptance does not prevent it from closing the contract when it is otherwise duly mailed.

Wagner *v.* Hallock,[4] decided in 1877, is sometimes referred to as supporting the doctrine that title in C. O. D. shipments shifts only at the final destination. It holds merely, in dependence on the rule as stated by Mr. Benjamin, that shipment of goods C. O. D. is not a delivery to the buyer, and the *jus disponendi* remains in the vendor. It goes no further than this, but merely holds that where

[1] 64 N. C. 743. [2] (1817–18) 1 B. & Ald. 681.
[3] (1897) 168 Mass. 198. [4] 3 Colo. 176.

goods are shipped by this method, no credit is given for the price, since they are not to be delivered until the price is paid. The phrase "*jus disponendi*" often has a different meaning from a mere reservation of lien, but here it seems to be used without any particular discrimination, the attention of the court is in no way addressed to the distinction between reserving title and reserving a vendor's lien, and the whole subject is very slightly touched in the opinion.

In Higgins *v.* Murray,[1] the New York Court of Appeals, in 1878, dealt with the following facts: The plaintiff was employed to manufacture for the defendant a set of circus tents from plaintiff's material. No place of delivery or payment was specified, and, having completed the tents, plaintiff was requested by letter of the defendant to ship them to the defendant at a given place. He shipped them C. O. D., and they were destroyed by fire *en route*. Plaintiff sued for their value, and it was held that defendant was liable, this liability not depending on the technical title, but being completed when the shipment was made as requested; that the plaintiff had a lien for the value of his labor and material, and that retaining this lien by shipping them C. O. D. was not inconsistent with and did not affect his right to enforce such liability. This is a decision by the Court of Appeals of New York, eighteen years subsequent to the case in 1 Daly, and, in so far as it reaches a different conclusion, the earlier case by the inferior court must be considered discredited.

In State *v.* Intoxicating Liquors,[2] the facts were these: Whiskey was sent C. O. D. from Boston, Mass., to Winthrop, Maine, and seized on its arrival as subject to confiscation under the Maine liquor law. The buyer tendered the charges and then demanded the package of the express company and the officer. The court held,

"the title passed to the vendee when the bargain was struck. Any loss of the property by accident would have been his loss. The vendor had a lien on the goods for his price. The vendor could sue for the price, and the vendee, upon a tender of the price, could sue for the property,"

and that the package was not subject to confiscation as the sale was valid in Massachusetts.

[1] 73 N. Y. 252. [2] (1882) 73 Me. 278.

In Pilgreen *v.* State,[1] the defendant, a licensed liquor dealer at Calera, received by mail an order from a person at Dollar, twelve miles away, asking him to send him a half gallon of whiskey by the Southern Express, C. O. D. Defendant did so, and it was received and paid for at the latter place, which was within five miles of certain churches, within which radius sales of liquor were illegal. The court, through Brickwell, C. J., holds the sale was made at Calera, the place of shipment, where all the dealings between buyer and seller occurred, and the offer was received and accepted.

"The general property in the thing sold there passed to the buyer by the delivery to the carrier of his own appointment, though he could not entitle himself to possession until he paid the price to the carrier. The carrier was his agent to receive the thing sold at Calera, and was the agent of the seller to receive the price." The risk of loss is held on the buyer, but the seller "has a lien on the property for the price."

State *v.* Carl,[2] was decided in 1884. This was an indictment charging that defendants sold intoxicating liquors within three miles of the Presbyterian church in the town of Ozark, after the county court had, by order, pursuant to statute, prohibited such sales. It appeared that Davidson, at Ozark, sent a written order to defendants, merchants at Little Rock, to send him a gallon of whiskey, C. O. D. This they did, agreeing with the express company if not taken in thirty days that it be returned, and that senders would pay freight both ways. Davidson received and paid for it. Held, a sale at Little Rock, the place of shipment. The court relied on the Alabama, Pennsylvania and Maine cases for this doctrine.

The case of United States *v.* Shriver,[3] was decided in the United States District Court for the Southern District of Illinois, in 1885. The defendant was indicted for carrying on the business of a retail liquor dealer at Fairfield, without having paid the special tax required by the federal laws. It appeared that his regular place of business was at Shawneetown, Illinois, where he was a licensed dealer, but that he went to Fairfield to solicit trade, taking samples which he exhibited; that he there took orders and made a

[1] (1884) 71 Ala. 368. [2] 43 Ark. 353. 51 Am. R. 565.
[3] 23 Fed. 134.

contract with the agent of the express company, whereby such agent was to act as his agent for receiving and distributing such liquors as he might ship, and to collect his bills for him, for which he was to be paid 10%. He arranged that parties in Fairfield who wished liquors forwarded, and desired to save the return express charges, should have the liquors sent them by express in jugs, with no charges on the waybill to be collected by the express company except that for carriage, and that the jugs were to have the shipping tag attached, on which would appear the name of the consignee and the value of the liquor. The Fairfield agent was to hold such jugs until the persons named on the tags called for them, when, on paying the amount on the tags as express charges, the agent was to deliver the jugs to the persons named, or to any others who brought orders from the persons so named on the tags. In some other shipments the shipment was made C. O. D. It was held that the express agent at Fairfield was the actual agent of the defendant in receiving and delivering the liquor shipped to Fairfield, and in collecting the price, since defendant employed him for that purpose and agreed to pay him a percentage; that the ownership in the packages shipped C. O. D., and possession as well, remained in the defendant, while in the hands of the agent at Fairfield, as completely as before they left the store in Shawneetown, and that the sale did not take place until the defendant, by his agent, received the money at Fairfield; and it was held that this would be true, even though there were no special agreement with the express agent at Fairfield for handling the liquor, if the liquor were sent C. O. D. The decision is by Treat, District Judge, and rests upon no citation of decided cases or of elementary works.

United States *v.* Cline,[1] decided by the United States District Court, Western District of North Carolina, October, 1885, was an indictment for retailing liquors without a license. Defendant paid a special tax and was licensed to retail liquors at his place of business in Catawaba county. A person in Lincoln county sent a message, asking the defendant to send or bring him liquor, and the defendant in person delivered the same in Lincoln county. A second

[1] 25 Fed. 515.

witness testified that he met the defendant in Lincoln county, made a contract for two gallons of liquor, which were afterwards paid for on delivery by the defendant in said Lincoln county. In the charge to the jury, Dick, District Judge, discussed at length the law of sales, and said if the vendor delivers an article ordered to a common carrier, marked C. O. D., and directed to an intended purchaser, the contract of sale is completed at the place of delivery to the purchaser, on the payment of the price, as the common carrier is the agent of the vendor for the purposes expressed, and the ownership of the property, set apart for the purchaser, does not pass to him until he pays the price. "This principle of law," he says, "was applied by me in this court several years ago in the trial of the case of the United States *v.* Williams, and I am informed that the commissioner of internal revenue has so ruled in the collection of special taxes from dealers in liquors." He goes on to hold that the internal revenue law contemplates that the contract of sale shall be consummated in the place specified in the license granted; that the retailer's privilege is limited to carrying on his business at a certain place, where all his transactions are subject to official inspection, and he can have but few opportunities of evading the law; that in these cases the sales were not completed until the liquor was delivered in Lincoln county; and that a verdict of guilty should be returned.

It will be noticed that in this case there is no showing that a common carrier intervened between the vendor and the vendee, but the delivery by the vendor was made in unlicensed territory, without the intervention of any other person whatever. It seems plain that, under all principles and authorities, the sale in such case was consummated in the unlicensed territory, and that the decision that the defendant was guilty of a violation of the revenue laws by the sale of liquor without license was beyond dispute. The discussion as to packages sent C. O. D. is by way of argument and dicta only.

In 1885 the Supreme Court of Vermont decided the case of State *v.* O'Neill,[1] involving criminal proceedings against John O'Neill, a wholesale and retail liquor dealer at White-

[1] 58 Vt. 140.

hall, N. Y., who had forwarded numerous jugs of liquor to customers at Rutland, Vermont, pursuant to orders received by mail or telegram, in many cases directing that the shipment be made C. O. D., but not so directing in all cases. The liquors were, however, habitually shipped C. O. D. and were delivered to the customers in Vermont upon the payment of the price. The facts were admitted, and the defendant requested that the jury be instructed that they did not constitute an offense under the statutes of Vermont. The court declined to so instruct, and, on the contrary, instructed the jury that, if they believed the facts set forth in the admission to be true, they should find a verdict of guilty. The court also charged that the only ground on which defendant could escape liability was that the sale of the liquor was made in New York, and that the title thereto passed to the buyer when it was delivered to the express company at Whitehall. That the transaction in New York, if it was a complete sale, was a lawful one; but the court held further that when the defendant sent the liquor, with instructions to the express company to deliver it only on being paid for, the title remained in O'Neill. It remained his property until delivered to Hopkins. As soon as it passed the line into this State, it was O'Neill's liquor in this State (Vt.). By sending it in response to Hopkins' letter, with the instructions indicated by C. O. D., as testified to by Mr. Barker, the express agent, O'Neill fulfilled the order conditionally, and the effect of this condition was to keep the title and control of the liquor within himself. If, in response to Hopkins' letter, O'Neill had taken the jug in his hand and come here with it, with a view of delivering it to Hopkins upon payment, probably no one would say but that, at any time previous to the delivery, it was his liquor, and if it was his intent to deliver it here, then he was owning and keeping it here with that intent. If, instead of coming himself with it, he had sent a clerk in his store with it, it would have been just as much his liquor as though he had brought it in person. It would have been his act, by his agent. Instead of sending it by his own clerk, he makes the express company his agent to bring it, with precisely the same instructions.

The case was very ably and fully argued before the

Supreme Court, and an extended citation of the English and American decisions was made. The opinion of the court was rendered by Chief Justice Royce, and it was held that the case must turn upon the question of whether the express company was the agent of the vendor or of the vendee; that the liquor was delivered in every case with the direction that it should not be surrendered to the consignee, except upon payment of the price and charges for transportation; that whether property passes from the vendor to the vendee is always a question of the intention of the parties, to be gathered from their acts and all the facts and circumstances; that in this case the shipments were in accordance with the terms of the orders; that the condition of payment before delivery of possession to the consignee was attached to the very body of the contract and to the act of delivery to the carrier; that, with this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was intended by the consignor as a delivery to the consignee, or as a surrender of the legal title; that the seller could not more positively and unequivocally express his intention not to relinquish his right to property or possession until payment; that the case could not be distinguished in principle from a vendor who sends his clerk or agent to deliver the goods on payment of the price; and that there was a complete executory contract of sale in New York, but the completed sale was in Vermont. The court relied particularly upon the case of the People *v.* Shriver.[1]

This Vermont decision was carried by writ of error to the Supreme Court of the United States, but the writ was dismissed, the majority of the court holding that no federal question was involved. In a dissenting opinion, Justice Harlan intimates his assent to the doctrine of the Vermont court that title did not pass until the liquor was received and paid for.[2]

Two years later the Supreme Court of Vermont decided the case of State *v.* Goss,[3] affirming in general the doctrine of the case of State *v.* O'Neill, but holding that the carrier

[1] (1885) 31 Albany Law Journal 163 (which is the same case cited supra from 23 Fed.)

[2] O'Neill *v.* Vermont (1891) 144 U. S. 323. [3] (1887) 9 Atl. 829.

was not liable where he had no knowledge of the contents of the package.

In State *v.* United States Express Co.,[1] it was held, in December, 1886, that liquors shipped into the state C. O. D., and held by the express company for delivery to the consignee on payment of the price, were subject to seizure, on the ground that the liquors were the property of the consignors, held by the express company, as their agents, for the purpose of sale. The proceeding was held to be against the property only, and it was therefore immaterial whether the agents of the company knew the character of the package or not. The opinion covers less than one page, and cites no authorities, except the statutes of Iowa.

In Lane *v.* Chadwick,[2] (January, 1888) it was decided that where goods were delivered to a carrier in two boxes, securely nailed, accompanied by an itemized bill, and the carrier was instructed to deliver them to the plaintiff on payment of the bill in cash, the carrier was agent of the consignor; that until the goods were delivered to the consignee, no title or right of possession would pass to her, and that, therefore, the consignee could not maintain replevin for the goods. It appears that the consignee claimed the right to unpack the boxes and to examine the contents before paying the charges, and that this was not conceded by the carrier, and that replevin was then brought by her. It will be found that in this case the plaintiff sued out her writ of replevin before she made absolute tender of the charges. The court held she must have a right to immediate and exclusive possession of the goods at the time she sued out her writ, and that she plainly lacked on any interpretation. The court relies on an earlier case where *jus disponendi* was expressly reserved by the bill of lading, a wholly different form of shipment.

In Commonwealth *v.* Fleming,[3] decided October and November, 1889, the court dealt with the sale of liquors by a wholesale dealer in Allegheny county, made by shipment in response to an order posted by the purchaser in Mercer county. The liquor was shipped in Allegheny county, C. O. D., and was received and the charges paid in Mercer county. The vendors had a license to sell

[1] 70 Iowa 271. [2] 146 Mass. 68. 15 N. E. 121. [3] 130 Pa. St. 138.

liquors in Allegheny county, but none in Mercer county. The lower court held that the sale was consummated in the place of final delivery, but this was reversed by the supreme court. That court held that the carrier was the agent of the seller to receive and return the price, but that, if the carrier gave credit to the buyer, and delivered the goods without collecting the price, the title would be transferred, and the purchaser could hold the goods. That the shipment was kindred with the tender of goods bought where the parties acted without an intervening bailee, and that, on such tender, the vendor has done all that he is bound to do. The court relied upon the case concerning the circus tents, decided in the 73 N. Y., *supra*, and said that the effect of the shipment C. O. D. was to retain the seller's lien merely; that no text writer's statement or decision could be found holding that no title passed to the purchaser.

In Norfolk Southern R. Co. *v.* Barnes,[1] the Supreme Court of North Carolina, in 1889, held a carrier who has negligently delivered goods to a vendee of the shipper, without collecting the purchase money as should have been done, or requiring the production of the bill of lading, cannot recover from a bona fide purchaser from such vendee. The goods were sent in effect C. O. D. The court says:

> "As soon as the goods were delivered to the carrier, the right of property passed to the vendee, but the right of possession remained in the vendor until the price was paid. This possession he lost by the negligence of his agent, and we are of the opinion that he should not be permitted to recover against the defendant, who bought of the vendee in possession for value and without notice."

The goods shipped in this case were four buggies.

Dunn *v.* State,[2] decided in February, 1889, held that, where a jug of whiskey was ordered from Douglas county and there paid for, but shipped by express from Atlanta in Fulton county and finally received by the buyer in Douglas county, where he paid the express charges on it, the sale was consummated in Atlanta and the whiskey then became the property of the buyer and was thereafter at his risk. A conviction of unlawfully selling liquor

[1] 10 S. E. 83. [2] (Ga.) 8 S. E. 806.

in Douglas county was therefore reversed. The jug seems to have been sent C. O. D. as to charges for carriage, but the price was paid in advance. The case was cited in 118 Iowa, referred to below, as supporting the opposite doctrine from that which it seems as above to maintain.

Crabb *v.* State[1] was decided by the Supreme Court of Georgia in February, 1892, and held,

> "A sale of whiskey sent by express C. O. D. is not complete until the whiskey is delivered and paid for, and the express agent making the delivery and collection in a county where sale is lawfully prohibited, is subject to indictment if he acts knowingly in completing the sale."

The decision was apparently reached in ignorance of the decision by the same court in 1889 cited *supra*. The Supreme Court of Georgia therefore speaks with a divided voice, but its later utterance follows Vermont.

State *v.* Wingfield,[2] held that where beer was shipped into a no license district, C. O. D., to a person who there delivered it, on payment of the price, the sale was made in the unlicensed district, and there was an offense against the criminal law. The court relies upon the Vermont case, but the decision seems to be rendered without knowledge on the part of the court or counsel of the many opposing decisions.

State *v.* Flanagan[3] was decided by the Supreme Court of West Virginia in June, 1893. A party in Dodridge county sent a post card to a licensed liquor dealer in Wood county, directing a package of whiskey to be sent to him by express, C. O. D. This was done. It was held that the sale was made in Wood county, and the vendor was not liable to indictment in Dodridge county for retailing liquors without license in the latter county. The court holds that any other interpretation would prevent wholesale merchants from shipping liquors in response to letters or telegrams, although they had fully complied with the law licensing them, and would confine their business exclusively to their own county, and that such a construction is not in accord with either the letter or spirit of the law.

The Court of Criminal Appeals of Texas, in February, 1897, held, in Freshman *v.* State,[4] that where intoxicating

[1] 15 S. E., 455. [2] 115 Mo. 428. [3] 17 S. E. 792. [4] 38 S. W. 1007.

liquors are ordered in a no license district to be shipped C. O. D. from an outside point, the purchaser to pay expressage, the sale is completed at the point of shipment. They rely upon the earlier decision of Bruce *v.* State,[1] and the court holds that the fact that the buyer pays the cost of transportation gives force to the proposition that the sale is completed at the point of delivery to the common carrier. The case in the 35 S. W. mentioned *supra*, was decided in 1896 but, though announcing the rule as above, held the special terms of the contract, that, if the beer shipped should sour or get lost, the seller should stand the loss and that title remained in the seller till it was received by the buyer, controlled, and the sale was not executed until such final delivery.

In James *v.* Commonwealth,[2] the Court of Appeals of Kentucky, in October, 1897, held, upon an indictment charging the illegal sale of liquor, that where whiskey, ordered by letter, is shipped from one county to another by express, C. O. D., the sale takes place in the county in which the whiskey is delivered to the carrier, and is not a violation of the prohibitory liquor law in force in the county to which it is shipped. The court relies upon an earlier decision in the Superior Court of the state in 1889, and upon the doctrine as stated by Benjamin on Sales, and by the Supreme Court of Alabama in the 71 Alabama already referred to.

In State *v.* Peters,[3] decided in November, 1897, the Supreme Court of Maine dealt with the following facts: Henry B. Peters was indicted for selling butterine contrary to the statute prohibiting the sale of adulterated butter. The defendant asked an instruction that the sale alleged did not take place in the county of Kennebec, in which the indictment was pending, and that therefore there must be a verdict of not guilty. This was refused, and a verdict of guilty rendered. The matter was carried up on exceptions, and it appeared that McLaughlin, residing in Augusta, wrote to a company, of which the defendant was manager, request-

[1] 35 S. W. 383. [2] 42 N. W. 1108.

[3] 39 Atl. 342. See also State *v.* Intox. Liq. (1904) 98 Me. 464, holding it settled law in Maine that title to goods shipped C. O. D. passes at point of shipment.

ing him to ship via American Express, C. O. D., as soon as possible, three tubs of butterine. The letter was written and mailed at Augusta. Defendant made no reply, but shortly after delivered the butterine ordered to the American Express Company at Portland, to be sent C. O. D. to McLaughlin at Old Orchard. Subsequently, by McLaughlin's direction, the butterine was re-shipped to him at Augusta, and there delivered to him on his paying the price and transportation charges. The state claimed a sale at Augusta. Held that the proposition to buy was accepted by the delivery of the butterine to the carrier designated; that this constituted a sale, and was at Portland, and not at Augusta; that the fact that the shipment was C. O. D. in no way altered this, the preceding case in the 73 Maine having so settled the law of the state.

United States *v.* Chevallier,[1] was a decision by the Circuit Court of Appeals in the Ninth Circuit, February 4th, 1901. Chevallier was licensed to sell liquors in San Francisco, California. He had a branch office in Portland, Oregon, where he kept no liquors, but the agent there received orders, forwarded them to the defendant's house at San Francisco, to be approved and filled, and, when approved, the orders were shipped directly from the San Francisco house to the buyer in Oregon, at the buyer's risk. The agent in Portland received a commission, and was authorized, under some circumstances, to receive the price. The court held that, since the house in San Francisco had the right to cancel the contracts of sale made by the agent at Portland, and filled all orders accepted by shipping the goods directly from San Francisco to the buyers, that the sales were wholly made at San Francisco, even though the agent was authorized to make binding contracts and to collect the purchase money, and that the defendant was not subject to the internal revenue tax as an Oregon liquor dealer, though his method may have been devised to evade such tax. The court says that the sales were not of specific articles, but of goods carried in stock; that no sale could be completed until the goods were separated and delivered to the carrier, and that the place of such delivery is the place of the sale. The court says that a different case

[1] 107 Fed. 434.

would have been presented if the goods had been sent C. O. D.

The effect of a sale C. O. D. is, in this case, merely touched *arguendo*, and, though the case is sometimes cited as supporting the rule that a sale C. O. D. is consummated only at the place of final delivery, it supports that view, if at all, merely by a brief and indefinite dictum, namely, that sales C. O. D. were different from those there considered.

The Supreme Court of Kansas, in April, 1902, in State *v.* Cairns,[1] held:

> "The agent of the express company who, in good faith, delivers to the consignee, or upon his order, goods carried by his principal C. O. D., and collects the charges thereon, is not guilty of selling intoxicating liquors to the purchaser, or his order, though he has reason to believe, or knows the goods consigned and delivered to be intoxicating liquors.
>
> "In such case it is the consignor who delivers the intoxicating liquor to the carrier upon an order from the consignee, that makes the sale, and the sale is made at the place of delivery to the common carrier."

Mr. Justice Pollock, in giving the opinion for the court, relies upon the 17th American & Eng. Enc. of Law (second edition), page 300, where the author of that work holds that, so far as cases dealing with intoxicating liquors are concerned, the weight of authority is against the view that the sale of liquor C. O. D. takes place on the final receipt of the goods from the carrier. He also relies upon the case in the 130 Pennsylvania, upon the 43 Arkansas, and the Kentucky case.

State *v.* American Express Company[2] was decided on October 30th, 1902. Intoxicating liquors, in possession of Coffin, agent for the express company at Tama, Iowa, were seized and condemned on judgment of a justice of the peace and ordered destroyed, on the ground that they were being kept by defendant to be sold in violation of the law. The District Court reversed this judgment, and the State appealed. An opinion *per curiam* was rendered, no Justice identifying his name with it. The liquor was in quart bottles, shipped from Rock Island, Illinois, to be delivered to

[1] 68 Pac., 621.

[2] 118 Iowa, 447. See also Latta *v.* U. S. Ex. Co. (Iowa 1902) 92 N. W. Rep. 68. Dosh *v.* U. S. Exp. (Ia. 1904) 99 N. W. 228.

consignees on payment of $3 and express charges on such packages. The express company had no knowledge of the contents of the packages. The court held the simple question was whether delivery to the consignee would have constituted sales of the liquor at Tama (which would violate the laws of Iowa), or whether the sales were made at Rock Island; that if the express company was merely delivering goods sold in Illinois, then it was discharging its functions in carrying on interstate commerce, and no State law could warrant interference; but, if the express company were attempting to consummate in Iowa a sale illegal by Iowa law, the rule would be otherwise. The court recognizes the diversity of opinion as to the *locus* of such sales. The majority of the justices hold that, if the question were *res integra* in the State, they would incline to the view that, on such shipment, the carrier is agent of the buyer for the purpose of transportation, of the seller for retention of possession and collection of the price, and that title passed to the buyer on delivery to the carrier. They found themselves, however, foreclosed by State *v.* United States Express Co.,[1] where, with hardly more than casual statement, the court held the contrary. They decline to overrule the earlier case for the convenience of the liquor traffic, but adhere to it, deeming it supported by numerous decisions, though not by the weight of judicial authority.

United States *v.* Adams Express Company,[2] decided on December 22nd, 1902, by the United States District Court for the Southern District of Iowa, the Hon. Smith McPherson, District Judge, giving the opinion, was a criminal prosecution against the express company on a charge that it was carrying on the business of a retail liquor dealer. The allegations were that the company received from a vendor at Dallas, Illinois, jugs of intoxicating liquor, addressed to parties in Iowa, as per orders from them, and that the shipments were made C. O. D., and that the express company collected the price and charges on delivery in Iowa, and returned the price to the consignor. There was a demurrer to the indictment, as not alleging facts constituting an offense. Judge McPherson holds that carrying merchandise C. O. D. is part of the ordinary and lawful business of

[1] 70 Iowa 271. [2] 119 Fed. 240.

carriers, and stimulates and facilitates trade; that the carrier has no interest in the transactions other than as a carrier, having no share nor profit in the sale; that title did not pass when vendor received the order, since he could ignore that order, but that title passed when the liquor, duly addressed, was deposited in the office of the express company at Dallas, Illinois, with direction to carry it to Iowa and deliver it to the consignee, after first collecting the price; that the great weight of authority sustains this view, and that counsel for the prosecution conceded this as to state decisions; that the Supreme Court of Iowa had many times so decided, and he rests on the cases so holding above, and cites Brown *v.* Wieland[1] (Iowa), and the doctrine as laid down by Benjamin on Sales. He concedes that United States *v.* Shriver,[2] sustains the prosecution, but says the weight of authority, both state and federal, is the other way, and that he is clear in the opinion that the fact of the goods being carried C. O. D. does not change the rule; that, as the express company did not sell the liquors, it was not engaged in the business of a liquor seller, and that the prosecution could not be maintained.

In the City of Carthage *v.* Duvall,[3] decided in April, 1903, the court holds that the great weight of authority supports the vesting of title to goods shipped C. O. D. in the consignee on the delivery to the carrier, relying for this on a review of the cases and on the American & Eng. Enc. of Law,[4] and in June, 1903, in the City of Carthage *v.* Munsell,[5] the above case was cited and followed.

That the Pennsylvania rule is the prevailing rule, see Benjamin on Sales (Seventh Edition), p. 374, and p. 544, where the cases on each side are collected, and Mechem on Sales, Vol. 1, p. 616, sec. 740; p. 670, sec. 794.

From the above cases it will be seen that the rule that the sale takes place when and where delivery is made to the carrier, is supported, in the following order of time, by North Carolina, New York, Maine, Alabama, Arkansas, Pennsylvania, West Virginia, Texas, Kentucky, Kansas, by one Federal district court, and by Illinois. That the

[1] 89 N. W. 17. [2] 23 Fed. 134. [3] 202 Ill. 234.
[4] Vol. 17, p. 300 (2nd Ed.) [5] 67 N. W. 831.

rule that the sale in such shipments only takes place when and where the goods are delivered by the carrier to the consignee, is supported by one, and countenanced by another federal decision, and in the order named, by the supreme courts of Vermont, Georgia, Iowa, and Missouri, with some slight support from Massachusetts and Colorado.

It seems plain that the great weight of authority is with the former view, often referred to as the Pennsylvania rule, that, in case of sales by shipments C. O. D. of goods consigned through a common carrier to the buyer, the sale takes place at the point of shipment, and that there is thereafter reserved merely a vendor's lien; and, that the weight of authority is equally strong against the latter doctrine, sometimes known as the Vermont rule, that in such cases title is wholly reserved, and that the sale takes place and the title is transferred only at the place of ultimate destination, on payment of the price and delivery of the goods.

It is respectfully submitted that the rule so supported by the weight of authority is equally well supported upon the grounds of reason.

It would seem a safe and fundamental rule, in interpreting a contract of shipment, special and peculiar in one detail alone, that this should be interpreted, if possible, so as to modify the effects of shipment, to no greater extent than is necessary to carry out the special purpose indicated. This leaves the special contract to be in all other respects construed like the ordinary contract of shipment, and yet perfectly carries out the particular intent of the parties. The Pennsylvania rule exactly accords with this highly reasonable canon of construction. It differentiates with exact nicety the shipment C. O. D. as far as is necessary to enforce its intent, and no further.

The Pennsylvania rule, moreover, prevents the holding of men for crime under a forced and artificial construction as to their knowledge of and liability to laws at remote points. If the Vermont rule were to prevail, no dealer could safely ship any article C. O. D. the sale of which was ever placed under restriction, without carefully informing himself as to the statutes, and even the local ordinances, in force at the point of destination. Such a requirement would greatly hamper many large and useful branches of trade,

as those of the druggist, dealers in oils and illuminants generally, and, oftentimes, dealers in provisions.

It is submitted, moreover, that the Vermont rule, in its effect, offends against principles of equal justice, if it is supported merely as maintaining desired local police regulations, since it enforces those regulations against the poorer class of buyers and those without established credit, to whom shipments are apt to be made C. O. D., but does not enforce them against those who advance the cash, or whose credit is established and known.

The Vermont rule, moreover, is distinctly hostile to the free commercial intercourse of our own communities, and in effect, limits or denies to the local buyer the advantages of the better markets which are accessible to him by post and by express.

The argument that the carrier of a package sent C. O. D. is in no different situation from the clerk or servant of the seller ignores the fact that a carrier taking the same package, but not C. O. D., is by no means in the same situation as a servant of the shipper. The shipper cannot retake the goods at his will from such carrier, though he could so retake from his own servant. Neither can he under any proper construction retake at his will from the carrier C. O. D. The latter holds as bailee for the parties, owing a duty to each, and neither can destroy the other interest at will, nor can the carrier, without becoming liable.

Judge McPherson in favoring the carrying of merchandise C. O. D. because it "stimulates and facilitates trade," follows the footsteps of the best and greatest English judges, who constantly and confessedly construe and apply the laws affecting commercial affairs in the same spirit and for the same reason. It will be observed that every case cited above, decided by a court of last resort, dealing with the shipment of anything but intoxicating liquors, is in agreement with the Pennsylvania rule, and that it is only where the passionate feeling intervenes, engendered by differing views as to the sale of liquors, that any such court has agreed with the Vermont rule. A dispassionate judgment upon a point of law is perhaps as apt to be right as one affected by deep feeling.

It is therefore urged that the Vermont rule ought to

yield to the weight of reason and authority, and that shipments C. O. D. ought to be as unhampered as those which are made without this special condition, and be held identical with them, except for the lien reserved. The police regulation, if necessary, which the Vermont rule has sought to enforce, is as necessary for nineteen-twentieths of the packages sent by the express companies by ordinary shipments as for the one-twentieth sent by this special form of shipment.

A rule yearly affecting criminal and civil liability, in connection with over nine million consignments from town to town, county to county, state to state, and nation to nation, ought to be uniform as a matter of common safety and convenience, and in such a matter it would seem more fitting that the few should yield to the many than the many to the few.

In Mr. Williston's excellent "Draft of an Act Relating to the Sale of Goods" many sections (17 to 22) are devoted to "Transfer of Property as Between Seller and Buyer," and (22 to 26) to "Transfer of Title," but it is believed the case of shipments C. O. D. is not directly or in terms provided for.

The dangers and difficulties of the codifier are manifold, but the writer would, with deference, suggest the addition of a clause like the following:

"Provision, in the shipment of goods, for the collection of charges on the delivery thereof, shall not of itself change or affect the time or place of sale or transfer of title, but shall be construed as merely reserving a lien for the charges, unless otherwise provided by contract."

It is believed such a statutory rule would accord with the weight of reason and judicial authority.

CHARLES NOBLE GREGORY.